

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )	
FOR BENEFICIAL WATER USE PERMIT )	FINAL ORDER
NO. 56738-s76M BY BROOKSIDE )	
ESTATES, INC. )	

\* \* \* \* \*

The time period for filing exceptions to the Hearing Examiner's May 9, 1986 Proposal for Decision has expired. Timely exceptions were received from the Applicant.

For the reasons stated below and after having given the exceptions full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as set forth in the May 9, 1986 Proposal for Decision, with the modifications specifically discussed below, and incorporates them herein by reference.

RESPONSE TO EXCEPTIONS

Exception 1

Section 85-2-312(1) MCA (1985) forbids the Department to "issue a permit for more water . . . than can be beneficially used without waste<sup>1</sup> for the purposes stated in the application". In other words, the amount sought must be reasonable in relation

<sup>1</sup> Section 85-2-102(13) MCA (1985) defines "waste" as ". . . the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use."

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to the proposed use so as not to result in a waste of the water resource. In the Matter of the Application for Beneficial Water Use Permit No. 51938-s42M by Lester J. Ernster, Proposal for Decision, August 20, 1984, p. 20 (Final Order, October 31, 1984).

The purpose of this Application is appropriation of water for the "passive visual and audio enjoyment" of the residents of Brookside Estates. Therefore, Applicant must show that the amount of water it requested is reasonably necessary to effectuate the purpose of providing "passive visual and audio enjoyment" to the residents of Brookside Estates so as not to result in waste of the water resource or unnecessarily foreclose future beneficial uses by upstream appropriators.

Applicant has not offered a shred of evidence which relates the amount of water it has requested to the proposed use. It rather has stated its purpose and simply requested an amount of water which may or may not be reasonably needed to provide "passive visual and audio enjoyment" to Brookside residents. Thus, there is nothing in the record upon which to base a conclusion as to whether the full amount requested would be beneficially used without waste and any determination of this issue based on the record herein would require sheer speculation by the Hearing Examiner.

As Applicant presented no evidence addressing this issue, no rebuttal or contradiction from the objectors could be expected. Furthermore, it is not necessary that the objectors raise the argument that too much water is requested, as it is the independent duty of the Department to make certain that the

statutory requirements are met before issuing a permit. See § 85-2-310, 311, 312 MCA (1985). (The language therein does not limit the requirement that the applicant satisfy the relevant criteria to instances where objections are made to the application. That is, the applicant must present evidence which demonstrates compliance with the statute, whether or not objections to the application have been made.)

#### Exception 2 and Exception 3

Applicant has misconstrued Conclusion of Law No. 11. The Department does not require that Applicant prove the "exact minimum" amount of water necessary to effectuate the use proposed. Rather, the authorities cited require the legal conclusion that the Applicant must prove the amount of water requested is reasonably related to the use proposed. (See Proposal for Decision, Conclusion of Law 11; Response to Exception 1, supra.)

#### Exception 4

The burden of proving by substantial credible evidence that there will be no adverse effect to the water rights of a prior appropriator is specifically placed on the Applicant by statute. § 85-2-311(1)(b) MCA (1985). Thus, Objector Brown has no obligation to prove that adverse effect will occur. Rather, if a particular adverse effect is a reasonable possibility, Applicant must prove by substantial credible evidence that there will be no such adverse effect.

Exception 5

In order to clarify the response to this exception, an additional "Finding of Fact" is hereby incorporated:

31. Administrative notice is hereby taken of the contents of the revised (May 8, 1984) "Brookside on the Rattlesnake Pond and Stream Management Plan for Water Quality and Insect Control", on file as a public document, which contains denominated "construction measure No. 7", specifying "no discharge of toxic or deleterious substances will be permitted into the ponds." (Montana Department of Health and Environmental Sciences, Water Quality Bureau Records.)

Discussion:

The Water Quality Bureau may not legally issue a permit to discharge drainage if that operation, consistent with the limitations of the permit, will result in pollution of any state waters. Section 75-5-401(2) MCA (1985). "Pollution" means contamination or other alteration of the physical, chemical, or biological properties of any state waters which exceeds that permitted by Montana Water Quality Standards. § 75-5-103(5) MCA (1981). Those Water Quality Standards are established by the Board of Health and Environmental Sciences pursuant to § 75-5-301 MCA (1985). If existing water quality is higher than the established standard, it must be maintained at that high quality unless the Board is satisfied degradation is justified. See § 75-5-303 MCA (1985).



Water Quality Bureau approval of the plan (assuming such approval does not allow "justified degradation" of the creek) can be considered evidence in favor of Applicant's position that there will be no adverse affect to prior appropriators. However, this evidence must be weighed against Applicant's own admission that pesticides, herbicides, and fertilizers would enter the ponds and hence the source (Finding of Fact 23) in apparent contradiction to "construction measure No. 7" of the approved plan which does not allow toxic or deleterious substances to be discharged into the ponds. (Finding of Fact 20.)

Does Applicant not consider pesticides, herbicides and fertilizers to be toxic and deleterious? What is the Bureau's position? How can this discrepancy be resolved? These questions remain unanswerable based on this record.

Nevertheless, it is the independent duty of the Department to find, prior to issuing a permit, that there will be no adverse affect to prior appropriators. By Applicant's own admission, there will be substances discharged into Rattlesnake Creek which Objector Brown asserts may be toxic or deleterious and adversely affect her prior use; and, such belief seems reasonably founded, especially in light of the fact that the plan approved by the Water Quality Bureau specifies no such discharge will be permitted.

Applicant could have presented a copy of the approved plan to the Hearing Examiner for consideration and perhaps even have satisfactorily explained the apparent contradiction. However,

this it did not do. Neither did it demonstrate that Objector Brown's use would not be adversely affected by the admitted addition to the creek of such chemical substances.

Absent satisfactory reconciliation of the discordant data presented by Applicant, its allegations that there would be no adverse affect to a prior appropriators remain unsupported, and do not constitute the substantial credible evidence necessary to satisfy its burden. Therefore, Conclusion of Law 14 of the Proposal for Decision stands as set forth therein.

#### Exception 6

The majority of applications for permit are resolved without a formal hearing. Permit No. 55348-s76M was settled without formal hearing since all Objectors thereto, upon stipulation, withdrew their objections. Thus, Applicant did not have to formally prove at a hearing that the relevant criteria for permit issuance were met.

However, the Department can not issue a permit unless the criteria have been met. § 85-2-311, 312 MCA (1985). As the permit was issued, the Department was presumably satisfied that the necessary criteria were met, based on the material available in the Department file.

Though it is true that the Permit under consideration is sought for the same purpose as Permit No. 55348-s76M was sought, i.e., the "passive visual and audio enjoyment" of Brookside residents, Applicant now claims it requires a substantially enlarged water right to accomplish the same end as supposedly was

accomplished by Permit 55348-s76M. Applicant has not demonstrated that such additional water is reasonably necessary to the accomplishment of that same purpose. Neither has Applicant proven there will be no adverse effect to prior appropriators on Rattlesnake Creek (to which no discharge was authorized under Permit No. 55348-s76M). However, Applicant argues that it was not required to prove these certain criteria in order to obtain Permit No. 55348-s76M and that it should not be required to do so now, both Permits being for essentially the same purpose.

Applicant is in error. It was required to prove that the criteria were met prior to issuance of Permit No. 55348-s76M. Further, as each application must be determined to meet the criteria of § 85-2-311 prior to permit issuance, it is required to make such proof under this Application. The fact that the Application for Permit is sought for the same purpose as the existing Permit ("passive visual and audio enjoyment" of the residents of Brookside Estates), is not dispositive of whether this Application, which contains substantially differing use parameters, meets the criteria.

Exception 7 and Exception 8

The Proposed Conclusions of Law are competent, rationally based and are correct applications of the law to the facts in this matter.

Therefore, based upon the Findings of Fact and Conclusions of Law, all files and records in the matter, and any modifications specified herein, the Department makes the following:


FINAL ORDER


Application for Beneficial Water Use Permit No. 56738-s76M by Brookside Estates, Inc., is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 26 day of August, 1986.

  
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Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6605

  
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Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6625

AFFIDAVIT OF SERVICE  
MAILING

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

Donna Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 5, 1986, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER by the Department on the Application by BROOKSIDE ESTATES, INC., Application No. 56738-S76M, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Brookside Estates, Inc., P.O. Box 3416, Missoula, MT 59806
2. Montana Department of Fish, Wildlife & Parks, Larry G. Peterman, 1420 E. 6th Ave., Helena, MT 59620
3. Arlene Ward Braun, Harold A. Braun, 2614 Sycamore, Missoula, MT 59802
4. Thomas & Barrie Huff, 707 Dickinson, Missoula, MT 59802
5. F. Ervin & Christina King, 3117 Old Pond Rd., Missoula, MT 59802
6. Dennis Washington, P.O. Box 8989, Missoula, MT 59807
7. Mrs. John R. Collins, 3019 Old Pond Rd., Missoula, MT 59802
8. Thomas J. Collins, 3023 Old Pond Rd., Missoula, MT 59802
9. Gordon M. & Delores W. Anderson, 3313 Old Pond Rd., Missoula, MT 59802
10. Richard M. Boehmler, 3125 Old Pond Rd., Missoula, MT 59802
11. Doreen M. Shafizadeh, 3015 Old Pond Rd., Missoula, MT 59802
12. Paul & Karen Overland, 3321 Old Pond Rd., Missoula, MT 59802
13. Janis L. Bargmeyer Michaelson, 3105 Old Pond Rd., Missoula, MT 59802
14. H. Richard & M. Jeane Fevold, 3615 Creekwood Rd., Missoula, MT 59802
15. First National Montana Bank, Trustee, 101 E. Front, Drawer B., Missoula, MT 59806 - Attn: Susan K. O'Neil
16. Mike McLane, Manager, Water Rights Bureau Field Office, Missoula, MT (inter-departmental mail)
17. Robert Scott, Hearings Examiner, DNRC (hand deliver)
18. Gary Fritz, Administrator, Water Resources Division DNRC (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Donna Elser

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STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

On this 5<sup>th</sup> day of October, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Ann P. Gluck

Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1987

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BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 56738-s76M BY BROOKSIDE )  
ESTATES, INC. )

\* \* \* \* \*

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1985) and the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA (1985), a hearing in the above-entitled matter was held on December 16, 1985, in Missoula, Montana.

Appearances

Applicant Brookside Estates, Inc., was represented by Thomas M. Hanson, an engineer for Professional Consultants, Inc., (hereafter, "PCI") of Missoula, Montana.

Warren Wilcox, a principal of Brookside Estates, Inc., and Richard Ainsworth, an employee of PCI, appeared as witnesses for the Applicant.

Objectors Gordon and Delores Anderson (hereafter "Objector Anderson") were represented by Gordon Anderson.

Objectors Harold A. and Arlene W. Braun (hereafter, "Objector Braun") both appeared pro se.

Objector Richard M. Boehmler appeared pro se.

Objector John R. Collins, deceased, was represented by Mary Ellen Collins.

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Objector Thomas J. Collins appeared pro se.

Objectors H. Richard and M. Jeane Fevold (hereafter, "Objector Fevold") were represented by Richard Fevold who appeared personally.

Objectors Thomas and Barrie Huff (hereafter, "Objector Huff") were represented by Thomas Huff who appeared personally.

Objectors Paul and Karen Overland (hereafter, "Objector Overland") were represented by Karen Overland who appeared personally.

Objector Dennis Washington was represented by John Crowley.

Objector Department of Fish, Wildlife and Parks (hereafter, "FWP") was represented by Dennis Workman.

Lee Yelin, Water Rights Specialist for the Missoula Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "DNRC" or "Department"), appeared as DNRC staff expert witness.

#### STATEMENT OF THE CASE

Applicant presently holds Permit No. 55348-s76M to appropriate 500 gallons per minute (gpm) up to 800 acre-feet per year of water for non-consumptive recreational use. The source is Rattlesnake Creek. The Permit requires that the appropriated water be pumped only from the Hollenbeck Ditch (which initially diverts the water from Rattlesnake Creek). After flowing through a system of ponds, the water must be returned, undiminished in quantity, to the Hollenbeck Ditch. The Permittee may not cause

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more water to be diverted through the Hollenbeck Ditch than has historically been diverted. The Applicant has developed the resource as provided for in that Permit but now desires to substantially enlarge upon the design of the diversion system. Thus, Applicant has filed this Application which would supersede and obviate Permit No. 55348-s76M, which would be terminated upon issuance hereof.

Applicant proposes hereunder to excavate Hollenbeck Ditch creating a large "lower" pond. Thus, Applicant has requested a Permit to appropriate for non-consumptive use the maximum capacity flow of said ditch (1,795 gpm). From this lower pond, Applicant would pump 500 gpm into the system of "upper" ponds (currently in use under Permit No. 55348-s76M); the water would thence gravity flow back to the lower pond. In order to acquire sufficient water for the system at times when, for one reason or another, the Hollenbeck Ditch is running at a low flow rate, Applicant desires to appropriate an additional 500 gpm directly from Rattlesnake Creek. Utilizing the above-mentioned 500 gpm pump, water would be pumped from the creek into the upper ponds and would thence gravity flow to the lower pond. The flow of water removed from Rattlesnake Creek would be measured upon removal and an equal flow would be returned from the lower pond to the creek at the location where it was removed. The use is alleged to be non-consumptive.

If there is insufficient water in both ditch and creek, Applicant proposes to close the pond system and recirculate the water remaining therein.

All Objectors in this matter contend first, that there is no unappropriated water in Rattlesnake Creek, and second, that their rights would be adversely affected by any diminution of water quality or quantity caused by the proposed diversion.

#### Preliminary Matters

1. At the hearing, Applicant stated its desire to utilize the 500 gpm pump, proposed hereunder to supply the upper pond system with water from the lower pond and/or Rattlesnake Creek, to additionally supply the irrigation needs of Brookside Estates, pursuant to its claimed existing irrigation Water Right No. s76M-W099591. As such proposal would involve, at the very minimum, a change in point of diversion for the irrigation right, a Change Application must be filed to properly invoke Department jurisdiction in that matter. § 85-2-402 MCA (1985).

Applicant has not filed an application to change its claimed Appropriation Water Right. Therefore, any proposed change in the claimed existing irrigation water right is not properly before the Hearing Examiner and will not be considered or decided herein.

2. Applicant has further proposed to supplement the volume of water present in the pond system with water from a 25 gpm well located on its property to compensate for evaporative losses during periods of low water in both Rattlesnake Creek and Hollenbeck Ditch when the pond system would be placed in a mode of recirculation. In that case, the purpose and place of use of water from said 25 gpm well would, at least in part, need to be changed.

Whether Applicant has filed a notice of completion, see § 85-2-306 MCA (1985) or claim of existing right on said well, in order to effect the result here proposed, it must first apply for a Change in that right. § 85-2-402 MCA (1985). Applicant has not applied. Therefore, the proposal to supplement the pond system's water supply with the 25 gpm well is not properly before the Hearing Examiner and will not be considered or decided herein.

3. At the conclusion of the hearing in this matter, the record was left open for a period of 21 days for the inclusion therein of any stipulations the parties hereto may have agreed upon in the interim period.

The record closed January 6, 1986, with no stipulation filed prior to closure.

#### Exhibits

The Applicant submitted four exhibits in support of its Application.

Applicant's Exhibit 1 is a map entitled "Sheet 1 of 8 of the As Builts: Brookside Improvement Plan," prepared by PCI and purporting to illustrate the overall construction of Brookside Estates.

The Exhibit was admitted with the stipulation that the pump station site is represented on the map where it is presently located and that said site would be moved under this Application to a point marked on Applicant's Exhibit 2.

Applicant's Exhibit 2 is a map entitled "Sheet 2 of 8 of the As Builts: Brookside Site Grading and Drainage Plan" proposed by PCI and purporting to illustrate the topographic features of the area surrounding the proposed project; the pond areas are outlined in blue, diversion structures in red. The proposed pump station location is marked on the Exhibit in red longhand.

Applicant's Exhibit 2 was admitted without objection.

Applicant's Exhibit 3 consists of one page containing two diagrams purporting to show two cross-sectional areas of the Hollenbeck Ditch as it would exist after construction of the proposed project (at the entry and exit of the project). The entry (north section) is correlated to the location marked with a red "2" on Applicant's Exhibit 2; the exit (south section) is correlated to the location marked with a red "3" on Applicant's Exhibit 2.

Applicant's Exhibit 3 was admitted without objection.

Applicant's Exhibit 4 is entitled "Sheet 3 of 8 of the As Builts: Brookside Drainage Details" and contains diagrams purporting to show the details of dams to be built at the entry and exit to the development and the outlet structure which would return water from the "lower pond" to Rattlesnake Creek.

Applicant's Exhibit 4 was admitted without objection.

Objector Collins submitted one exhibit for the record.

Objector Collins Exhibit 1 consists of a letter dated November 13, 1985, addressed to Objector Collins, and signed by E. Lee Magone of Mountain Water Company, Missoula, Montana.

Objector Collins Exhibit 1 was admitted without objection.

Objector FWP submitted one exhibit for the record.

Objector FWP Exhibit 1 is a one page document purporting to show the flows of Rattlesnake Creek, as measured by Gary Blount near the mouth of Beeskove Creek, a tributary of Rattlesnake Creek upstream from the proposed diversion, on five dates during 1985.

Objector FWP Exhibit 1 was admitted without objection.

The Department submitted five exhibits for the record.

Department Exhibit 1 is the Department file in this matter.

Department Exhibit 1 was admitted without objection.

Department Exhibit 2 is the Department file pertaining to Permit No. 55348-s76M, previously issued to Applicant.

Department Exhibit 2 was admitted without objection.

Department Exhibit 3 is a photocopy of the water rights in the area of the source abstracted from DNRC files.

Department Exhibit 3 was admitted without objection.

Department Exhibit 4 is the Field Investigation in this matter, by Lee Yelin, Water Right Specialist for DNRC, dated December 10, 1985.

Department Exhibit 4 was admitted without objection.

Department Exhibit 5 is a photocopy of a report prepared by Dave Pengelly, former Field Office Manager of the Missoula Water Rights Bureau Area Field Office of the DNRC, dated August 1984, which was introduced for the data contained therein regarding average monthly discharge for Rattlesnake Creek from May 1958 to September 1967.

Department Exhibit 5 was admitted with the notation that the data cited therein represent average flows of Rattlesnake Creek in its entirety and not of its various channels separately.

#### PROPOSED FINDINGS OF FACT

1. The Application in the matter was regularly filed with the DNRC on July 19, 1984 at 1:15 p.m.

2. The DNRC has jurisdiction over the parties hereto and over the subject matter herein.

3. The pertinent facts of the Application were published in The Missoulian, a newspaper of general circulation in the area of the source, on September 26 and October 3, 1984.

4. The Applicant has a present bona fide intent to appropriate water for the maintenance of a series of ponds for aesthetic use by the inhabitants of Brookside Estates, Inc.

5. Applicant presently holds Permit No. 55348-s76M which allows it to appropriate, for non-consumptive recreational use, 500 gallons per minute (gpm) up to 800 acre-feet per year from Rattlesnake Creek by means of a pump set in the Hollenbeck Ditch with the condition that Permittee may not cause additional water

to be diverted through the Hollenbeck Ditch than has been historically diverted. (Department Records.) Applicant has agreed to the termination of Permit No. 55348-s76M providing the Permit herein applied for is granted. (Department Exhibit 1.)

6. Applicant seeks hereunder to appropriate 2,295 gpm up to 2,400 acre-feet per annum from Rattlesnake Creek between March 1 and October 31, inclusive, of each year, to be used non-consumptively in ponds to be located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 11, Township 13 North, Range 19 West, Missoula, Montana. (Application.) The requested flow rate of 2,295 gpm represents the maximum capacity of the Hollenbeck Ditch, which is approximately 1,795 gpm, plus 500 gpm to be pumped directly from Rattlesnake Creek. (Testimony of Thomas Hanson.) The requested points of diversion reflect the diversion point of each component flow rate--1,795 gpm diverted from Rattlesnake Creek at the headgate of the Hollenbeck Ditch, which headgate is located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 11, Township 13 North, Range 19 West, Missoula County, Montana; 500 gpm to be diverted from Rattlesnake Creek by pump in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 11, Township 13 North, Range 19 West, Missoula County, Montana.

7. The single proposed use is the circulation of water to create a "creekside environment" for the passive visual and audio enjoyment of all the residents of Brookside Estates rather than just the few owning lots adjacent to Rattlesnake Creek. The proposed use is a purely aesthetic use which Applicant considers to be, and denominates, "recreational." (Testimony of Thomas Hanson.)

8. To effect the proposed use, Applicant would excavate the existing Hollenbeck Ditch as it crosses the Brookside property to form a pond (hereafter, the "lower pond") of approximately 1.3 acre-feet capacity. To this end, Applicant has requested 1,795 gpm, the maximum flow rate of the Hollenbeck Ditch.

From the lower pond, water would be pumped uphill at the rate of 500 gpm and thence allowed to gravity flow through a series of upper ponds with a combined capacity of 2.6 acre-feet, presently in existence and operated under Permit No. 55348-s76M. The water would ultimately return to the lower pond. By means of check dams at the entrance and exit to the lower pond, Applicant would measure the flow of water (1) entering the lower pond from the Hollenbeck Ditch and (2) exiting the lower pond to the Hollenbeck Ditch. Applicant intends to make certain the lower pond water influx and efflux are always of equal magnitude. (Testimony of Thomas Hanson.)

9. In anticipation of the possibility that the Hollenbeck Ditch may not always carry enough water throughout the period of appropriation to provide Applicant with sufficient water to operate the entire pond system, Applicant proposes, in the event of insufficient water in the Hollenbeck Ditch, to supplement the supply of water to the pond system by pumping water to the upper ponds directly from a point on Rattlesnake Creek, more particularly, the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 11, Township 13 North, Range 19 West, Missoula County, Montana, rather than from just the lower pond. This water would be used to supplement and replenish the supply to the entire pond system, and would finally exit the lower pond and be returned to Rattlesnake Creek.



Applicant would install flow meters on both the pump and the pond outlet, and intends to return the same flow of water to Rattlesnake Creek as is then being removed therefrom, at the same point as it is removed. (Testimony of Thomas Hanson.)

10. In the event of insufficient water in both the Hollenbeck Ditch and Rattlesnake Creek, Applicant proposes to recirculate water held in the lower pond. (Testimony of Thomas Hanson.)

11. Whether Applicant has a ditch right in and to the Hollenbeck Ditch is not discernible from the record.

12. Applicant has lined that part of the pond system which is already in place with a clay liner which has virtually eliminated seepage loss from the pond system. There should be no seepage loss from the system proposed, as Applicant proposes to clay line the entire system. (Testimony of Thomas Hanson.)

13. Applicant's proposed circulation use would cause little diminution of the supply or disruption to stream-flow conditions; the maximum system loss would be through evaporation in the amount of 3,300 gallons per day, assuming no addition by precipitation. (Testimony of Thomas Hanson.)

14. Assuming regulation is effected as proposed (see Findings of Fact 8, 9, supra), the flow pattern historically available to downditch and downcreek users would be affected by Applicant's proposed use only during the period of the initial fill, when the downditch or downstream users would experience a reduction in flow as compared to the flow which has been

historically available during that period. The amount of water appropriated for the initial fill would not be returned to the source quickly but rather would remain in the system for an indefinite period; Applicant intends never to drain the pond unless it must. (Testimony of Thomas Hanson.)

15. The pump which is presently used to circulate 500 gpm throughout the system under Permit No. 55348-s76M would be moved from its present location to the proposed lower pond outlet point, so that water can be pumped from Rattlesnake Creek and returned thereto at virtually the same point. This change would be made with the intention of eliminating possible dewatering of a portion of the east channel of Rattlesnake Creek. (Testimony of Thomas Hanson.)

16. Applicant has filed a claim of existing right to an 1890 decreed water right to divert 325 gpm from Rattlesnake Creek for the purpose of irrigation. (Department records.) Applicant's pump capacity is presently 116 gpm for irrigation. (Testimony of Thomas Hanson.)

17. The capacity of the Hollenbeck Ditch is approximately 4 cubic feet per second (cfs). (Testimony of Lee Yelin, Thomas Hanson.)

18. The total claimed water rights on Hollenbeck Ditch equal approximately 3.9 cfs. (Testimony of Lee Yelin.)

19. The plans for the means of diversion, as shown in Exhibit 2 with details illustrated in Exhibit 4, have been approved by the Water Quality Bureau of the State of Montana. The outlet structure has been built with a "310" Permit from the Soil Conservation Service.

20. The covenants of the Brookside Estates, Inc. Homeowners' Association specify that the Homeowners' Association has the responsibility for water quality control. The pond and stream management plan for water quality and insect control has been approved by the Water Quality Bureau. (Testimony of Thomas Hanson.) The details of the management plan were not submitted for the record.

21. Rattlesnake Creek consists of two principal channels in the vicinity of the proposed diversion--the larger west channel and the smaller east channel. The smaller east channel divides into two branches above the proposed pump diversion. Applicant's pump would draw water when needed from the east branch of the east channel. The Hollenbeck Ditch diverts from the east channel just above its diversion into the east and west branch. (Testimony of H. Richard Fevold.) The flow of water in the east channel has decreased over the last twenty years because of interference at the point of divergence by users of the west channel. (Testimony of Thomas J. Collins.)

22. The management of Brookside Estates, Inc. would make the decision as to when water is to be pumped directly from Rattlesnake Creek. (Testimony of Thomas Hanson.)

23. Fertilizers and insecticides will be applied to the area surrounding the pond system, will enter the pond system and will exit to the source in return flow. Circulation of water through the pond system will result in some increase in water temperature. (Testimony of Thomas Hanson.)

24. Although most of the Objectors hereto who have water rights specify irrigation as the beneficial use, at least one, Arlene Braun, claims a well beneficially used for domestic purposes which is allegedly recharged by Rattlesnake Creek.

25. Mountain Water Company presently holds claimed Water Right No. S76M-W040170 to appropriate 23.65 cfs up to 17,164.65 acre-feet of water per year from Rattlesnake Creek. (Department Records.) This right has not been exercised since mid-1983 because of Giardia infestation. However, Mountain Water Company does not intend to abandon the right, but rather contemplates modification of its facilities to allow creek water to be used again. (Objector Collins' Exhibit 1.)

26. Although it is improbable that water will exist at the point designated for pumping from Rattlesnake Creek at times when there is insufficient water to provide 500 gpm to the Hollenbeck Ditch (testimony of H. Richard Fevold), presumably there will be periods when the Hollenbeck headgate is closed or partially closed for one reason or another with enough water flowing in the creek to reach the pump diversion point.

27. The average monthly flows of Rattlesnake Creek as measured at a point past all major diversions (including Mountain Water's diversion), i.e., a gaging station near its mouth, between May, 1958 and September, 1967, indicate the lowest monthly flow normally occurs in August at an average 15.2 cfs. The lowest recorded monthly flow during the period Applicant seeks to appropriate was 1.78 cfs (approximately 799 gpm) in March, 1964. Viewed as a whole, the available flow records indicate the

presence of sufficient water even during periods of low flow to supply 500 gpm to Applicant. (Department Exhibit 5, Objector FWP Exhibit 1.)

28. The mean low flow of Rattlesnake Creek at its mouth has been elevated since mid-1983 by the non-use of the average 23.2 cfs formerly used by Mountain Water Company. Thus, the average lowest monthly (August) flow since 1983 can be estimated at approximately 38.4 cfs or roughly 2½ times the average lowest monthly flow prior to mid-1983.

29. The record shows no planned uses or developments of Rattlesnake Creek water for which a permit has been issued or for which water has been reserved.

30. Applicant intends to submit to the regulation of the Hollenbeck Ditch headgate by the users of the Hollenbeck Ditch who have historically controlled it. (Testimony of Warren Wilcox.)

Based upon the foregoing Proposed Findings of Fact, the Hearing Examiner makes the following:

#### PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they appeared at the hearing or not. Title 85, Chapter 2, Part 3, MCA (1985).

2. The Department gave proper notice of the hearing and all substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. MCA § 85-2-311 directs the Department to issue a Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:
  - (i) at times when the water can be put to the use proposed by the applicant,
  - (ii) in the amount the applicant seeks to appropriate; and
  - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. Those Objectors who failed to appear at the hearing in this matter, in person or by representation, are in default. Administrative Rule of Montana 36.12.208.

5. The proposed use will not interfere unreasonably with other planned uses or developments for which a Permit has been issued or for which water has been reserved. (Finding of Fact 29.)

6. The legal requirements for a use to be considered non-consumptive are (1) that there will be little or no diminution of supply and (2) that the water will be returned to the source of supply sufficiently quickly that little or no disruption will occur to stream conditions below the point of

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return. In the Matter of the Application for Beneficial Water Use Permit No. 49573-s43B By Howard and Mildred Carter, Proposal for Decision, May 16, 1985, p. 25 (Final Order, January 20, 1986).

The initial fill of 3.9 acre-feet would create a diminution of supply in that amount at least until such amount was returned upon drainage of the system and the return would not be sufficiently rapid to avoid disruption of stream conditions. Thus, the initial fill of 500 gpm up to 3.9 acre-feet is a consumptive use. Applicant's proposition to recirculate the contents of the ponds when the source is insufficient, coupled with its intention never to drain the ponds except possibly for cleaning purposes, supports the conclusion that the initial fill is a legally consumptive use. (Finding of Fact 14.)

Otherwise, providing the diverted waters (after the initial fill is complete) are returned gallon for gallon (less potential evaporative loss) to the Hollenbeck Ditch or to Rattlesnake Creek as initially diverted, the circulation use may be considered non-consumptive, as there will be little diminution of the supply and as the delay in return will not significantly disrupt stream conditions. (Finding of Fact 13.)

7. That portion of the Application which requests appropriation of 1,795 gpm, the maximum flow of the Hollenbeck Ditch, for non-consumptive use (the creation of the lower pond--see Finding of Fact 8) would, if granted, enable Applicant to divert the maximum flow rate through the Hollenbeck Ditch at

any time during Applicant's period of appropriation, regardless of historical patterns of diversion (assuming, of course, that Applicant has ditch rights in the Hollenbeck Ditch).

Thus, under the proposal as stated in the Application, it would be necessary for the Applicant to regulate the flow of the Hollenbeck Ditch during the period it seeks to appropriate, as regulation at the headgate by the other users of the ditch would not then be feasible.

Applicant has presented no evidence specifying the means by which it would determine the amount of water needed by downditch users to enable it to regulate its return flow so that amounts unneeded by downditch users would in fact be returned to Rattlesnake Creek. Further, the record is not clear as to whether Applicant is capable of returning the potential maximum unneeded diversion of 1,795 gpm to Rattlesnake Creek through its proposed outlet structure.

Absent workable plans for such determination and regulation, water diverted at the Holleneck Ditch headgate in excess of amounts needed by ditch users could flow downditch nolens volens, resulting in a surplus of water to the ditch and a diminution in the source of supply. Thus, the appropriation, in so far as it exceeded the needs of downditch users, would be consumptive by definition (see Conclusion of Law No. 6, supra) and further would most probably not be put to beneficial use but would go to waste.



However, the Applicant has rendered the foregoing academic by its assertion at the hearing that its intention is in fact to submit to control of the headgate by the other ditch users. (Finding of Fact 30.) Of course, such a condition would limit the amount of water Applicant could receive via the Hollenbeck Ditch to the amount diverted by the other ditch users, i.e., to the historic flow of the ditch.

Therefore, because Applicant disclosed at the hearing its intention to submit to control by the other ditch users of the headgate of the Hollenbeck Ditch, the Hearing Examiner holds that that portion of the Application requesting flow rate of 1,795 gpm to supply the lower pond is superseded by the intent voiced at the hearing and accordingly further holds that the requested flow rate must therefore be recalculated to reflect this intent.

8. For purposes of analysis, the lower pond may theoretically be separated from the Hollenbeck Ditch and viewed as a "storage" pond. If water is pumped therefrom at the rate of 500 gpm, it is apparent that in order to maintain the lower pond at capacity, 500 gpm must be added thereto. Applicant proposes to add this water either by means of the Hollenbeck Ditch or directly from Rattlesnake Creek or by combination of these means. (Finding of Fact 8, 9.)

Accordingly, Applicant's proposal to supplement the Hollenbeck Ditch flow when it is low with water pumped directly from Rattlesnake Creek is a proposal to maintain 1.3 acre-feet of "storage" by providing the lower pond with a steady influx of 500 gpm to match the efflux to the upper ponds.

Thus, the non-consumptive portion of this appropriation (the portion circulated after the initial fill), may be quantified in the amount of 500 gpm to be drawn from one source, Rattlesnake Creek, at two different diversion points, the combined diversion equaling 500 gpm; the total storage capacity (upper and lower ponds) remains 3.9 acre-feet; the maximum annual volume is requantified at 543 acre-feet to reflect the volume diverted under the flow rate as requantified.

9. Ditch right and water rights are wholly separate and distinct. See Connolly v. Harrell, 102 Mont. 295 (1936); Smith v. Krutar, 153 Mont. 325 (1969); O'Connor v. Brodie, 153 Mont. 459 (1969). Thus, a grant by the Department of a permit to appropriate water does not in any way carry with it or imply the grant of a ditch right. Ditch rights must be acquired separately.

Therefore, in the case of an applicant that has specified an existing ditch as a conveyance means, the Department, in issuing a permit, merely recognizes that the facility for transmission from the source to the place of use is a feasible one. If he has no ditch right, the permittee must himself purchase the necessary transfer in interest. In the Matter of Beneficial Water Use Permit No. 55390-s76H by Heather J. Grayson, Proposal for Decision, January 24, 1986, p. 15, 16 (Final Order, March 7, 1986).

10. In light of Applicant's stated intent to defer to the historical use and control of the Hollenbeck headgate by the other ditch users (see Conclusion of Law 7, supra), that portion

of Applicant's request to non-consumptively utilize 500 gpm by pumping from Hollenbeck Ditch to the upper ponds is essentially the same proposal for which it has already received Permit No. 55348-s76M. As this appropriation will remain in force whether pursuant to a grant hereof or under the previous permit, no further discussion thereon is necessary.

11. Although use of water for recreation is expressly recognized as a beneficial use under § 85-2-102(2)(a) MCA (1985), it is not clear whether the legislature intended the term "recreation" to encompass a purely aesthetic use. However, even if the legislature did not so intend, an aesthetic use could stand independently as a beneficial use, providing the legislature did not intend that the categories listed in MCA § 85-2-102(2)(a) be exclusive.

Assuming without deciding that water can be appropriated for purely aesthetic reasons, i.e., that aesthetics is a beneficial use, the Applicant nevertheless must prove that the amount of water requested can be used without waste for the purpose stated, § 85-2-312 (1) MCA (1985), as the right may not be greater than the amount needed to serve the use. See Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Huffine v. Miller, 74 Mont. 50 (1925).

Witnesses for the Applicant have testified that the purpose of the proposed appropriation is to provide a creekside environment for the passive visual and audio enjoyment of the residents of Brookside Estates, rather than just the few residents who have lots adjacent to Rattlesnake Creek. (Finding

of Fact 7.) To accomplish this, Applicant proposes in essence to reroute a portion of Rattlesnake Creek. (Finding of Fact 8, 9.)

In a similar case before the Department, where Applicant had proposed to divert the entire flow of Granier Creek for "recreation," i.e., to reroute Granier Creek so it would meander through Applicant's golf course rather than flowing directly through it, the Department held that the Applicant had failed to show that the total amount of the proposed appropriation "can and will be beneficially used", reasoning that "although the Application in this matter recites the water is to be used for recreational purposes, nothing in the record indicates what recreational benefits may accrue through the rechannelling of Granier Creek." In the Matter of Application for Beneficial Water Use Permit Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates, Proposal for Decision, August 25, 1981, p. 16 (Final Order, October 6, 1981). "Assuming without deciding that such aesthetic derivatives belong to the class of uses that can be described as beneficial, nothing in the evidence demonstrates or indicates why a lesser quantity of water would not meet these same ends." Id. at pp. 11 and 12.

Although Applicant here does not propose rerouting Rattlesnake Creek itself, but rather only to reroute a portion of its flow, it remains essential that Applicant prove its need for the full amount requested, i.e., Applicant must prove that it will put all of the requested amount to beneficial use. The Applicant is entitled to the greatest quantity of water that it can beneficially use pursuant to its disclosed intentions, but an

unreasonable quantity is equivalent to waste. In the Matter of Application for Beneficial Water Use Permit No. 24921-s41E by Remi and Betty Jo Monforton, Proposal for Decision, September 30, 1981, p. 18 (Final Order, March 1, 1982).

Thus, Applicant must address the question of its "duty of water", which is the amount of water reasonably needed for a particular beneficial use. The Department must be provided sufficient information to allow it to determine that the quantity requested is essential to economically but successfully provide the benefit desired. See e.g., Allen v. Petrick, 69 Mont. 373, 379, 380 (1924); In the Matter of the Application for Beneficial Water Use Permit No. 53221-s400 by John E. and Betty J. Carney, Proposal for Decision, June 1, 1984, pp. 12, 13 (Final Order, August 7, 1984).

Here the benefit desired is the passive audio and visual enjoyment of the inhabitants of Brookside Estates, Inc., facilitated by the creek-like environment created by the diversion of a portion of Rattlesnake Creek. Thus, the issue can be precisely framed as follows: What amount of water is necessary to economically (efficiently), but successfully, provide for the passive audio and visual enjoyment of the inhabitants of Brookside Estates, Inc.?

Applicant has not addressed this question. However, it is of paramount importance that the economic factor be addressed, for without such limiting factor, an individual could (based upon the bald assertion that "greater amounts of water yield more enjoyment") receive a permit to divert the entire remaining

unappropriated flow of a given drainage for "aesthetic" or "recreational" purposes, thereby obtaining the power to prevent appropriation of water by future Applicants. Even though his use was non-consumptive, that individual could object to future proposed upstream diversions, claiming insufficient amounts of unappropriated water were available in the drainage for further appropriations.

Proposed uses of water for irrigation, mining, stockwater, industry, domestic, etc., must meet Departmental scrutiny as to the duty of water inherent in the use. The standard for recreational or aesthetic uses can be no less strict. No appropriation can be countenanced by the Department absent substantial credible evidence that the full requested amount is reasonably required for the successful implementation of the proposed beneficial use, for it is the policy of the State of Montana "to encourage the wise use of the State's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development and conservation of the water of the State for the maximum benefit of its people with the least possible degradation of natural aquatic ecosystems." § 85-2-101(3) MCA (1985) (emphasis added).

Applicant herein must present evidence regarding the amount of water which is reasonably needed to effect the desired benefit. This, Applicant has failed to do.

12. The means of diversion, construction and operation of the appropriation works are adequate to accomplish the diversion, circulation and regulation of 500 gpm through the proposed pond

system and to return such water to either the Hollenbeck Ditch or to Rattlesnake Creek in the same proportions diverted. The use of the flow meter and check dams as proposed allow adequately for administration of the diversion works for the purpose above stated.

13. As the proposed use, with the exception of the initial fill, is a non-consumptive use, in order to satisfy the criteria present in § 85-2-311(a), Applicant must show that there are sufficient waters remaining in the source of supply (as qualified by subsections (i), (ii) and (iii) of said Section) at his points of diversion.

The evidence presented demonstrates that in most years, even with exercise by Mountain Water of Water Right No. S76M-W040170, there is sufficient water reaching either or both of Applicant's proposed points of diversion to supply the amount requested throughout the period it can be put to use by the Applicant. (Finding of Fact 26, 27.)

14. As the circulation use proposed is non-consumptive, there will be no adverse affect to prior appropriators regarding the quantity of water available.

The evidence does, however, indicate that the quality of the water which would be returned to Rattlesnake Creek under the proposed appropriation may be diminished by an increase in temperature and concentration of pesticides, herbicides and fertilizers. Applicant has admitted this possibility but has not addressed it other than to say that its management plan for

insect and quality control has been reviewed and approved by the Water Quality Board and that water quality will be the responsibility of the Homeowners' Association.

Although the evidence does not indicate enough potential degradation of quality to adversely affect irrigation uses, there is sufficient potential for degradation that a domestic use may be affected and, as one Objector alleges such domestic use (Finding of Fact 24), Applicant must satisfactorily address the potential problem. The element of "quality" must be protected to the extent that the water will still be satisfactory for domestic purposes. See Atchison v. Peterson, 87 U.S. 507 (1874). In the Matter of the Application for Beneficial Water Use Permit No. 42666-q41F by Richard MacMillan, Proposal for Decision, May 3, 1984, p. 19 (Final Order, March 31, 1986).

Applicant's failure to present detailed plans to protect such uses (Finding of Fact 20) or, in the alternative, to adequately show that even if it did not do so there would be no adverse affect, constitutes failure to prove there will be no adverse affect to prior appropriators.

WHEREFORE, based upon the foregoing, and the evidence on the record herein, the Hearing Examiner proposes the following:

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ORDER

That Application for Beneficial Water Use Permit No. 56738-s76M by Brookside Estates, Inc. be denied.

NOTICE

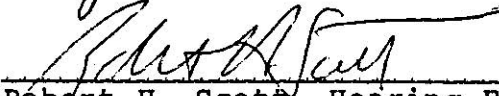
This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Division Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1).

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Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

DONE this 9 day of May, 1986.

  
Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620  
(406) 444 - 6625

CASE # 56738

AFFIDAVIT OF SERVICE  
MAILING

STATE OF MONTANA                   )  
  ) ss.  
County of Lewis & Clark )

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 12, 1986, she deposited in the United States mail, first class mail, a Proposal for Decision, an order by the Department on the Application by Brookside Estates, Inc., Application No. 56738-s76M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Brookside Estates, Inc., P.O. Box 3416, Missoula, MT 59806
2. Montana Dept. of Fish, Wildlife & Parks, Larry G. Peterman, 1420 E. 6th Ave., Helena, MT 59620
3. Arlene Ward Braun, Harold A. Braun, 2614 Sycamore, Missoula, MT 59802
4. Thomas & Barrie Huff, 707 Dickinson, Missoula, MT 59802
5. F. Ervin & Christina King, 3117 Old Pond Rd., Missoula, MT 59802
6. Dennis Washington, P.O. Box 8989, Missoula, MT 59807
7. Mrs. John Collins, for John R. Collins (deceased) 3019 Old Pond Rd., Missoula, MT 59802
8. Thomas J. Collins, 3023 Old Pond Rd., Missoula, MT 59802
9. Gordon M. & Delores W. Anderson, 3313 Old Pond Rd., Missoula, MT 59802
10. Richard M. Boehmler, 3125 Old Pond Rd., Missoula, MT 59802
11. Doreen M. Shafizadeh, 3015 Old Pond Rd., Missoula, MT 59802
12. Paul & Karen Overland, 3321 Old Pond Rd., Missoula, MT 59802
13. Janis L. Bargmeyer Michaelson, 3105 Old Pond Rd., Missoula, MT 59802
14. H. Richard & M. Jeane Fevold, 3615 Creekwood Rd., Missoula, MT 59802
15. First National Montana Bank, Trustee, 101 E. Front, Drawer B, Missoula, MT 59806; Attn: Susan K. O'Neil
16. Gary Fritz, Administrator, Water Resources Division (hand-deliver)
17. Bob Scott, Hearings Examiner, DNRC (hand-deliver)
18. Mike McLane, Manager, Water Rights Bureau Field Office (inter-departmental mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by



**CASE # 56738**

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

On this 12th day of May, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My Commission expires 1-21-1987

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